BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:	)	
[redacted]	)	NO.: 96-70
	)	DUE PROCESS HEARING

FINAL ORDER

Jack E. Seaman
Administrative Law Judge
611 Commerce Street, Ste. 2704
Nashville, Tennessee 37203
(615) 255-0033
Prof. Resp. No. 4058
August 28, 1997

FINAL ORDER

Case No. 96-70

I.

This case involves a student with various diagnoses beginning in 1995 and including dysthemia, attention deficit hyperactivity disorder (ADHD), major depression, attention deficit disorder (ADD), oppositional defiant disorder (ODD) and bipolar disorder NOS. This student has never been certified eligible for special education services by the local educational system. She was evaluated in November of 1995 following her return from a hospitalization and determined not eligible. She again was denied certification in January of 1996 after the parents requested further consideration at a time the student was recommended for expulsion.

The student has a tested IQ of 95. She has been continuously enrolled in this system from the first grade beginning in 1987. The student failed and was required to repeat Grades 1 and 7. The parents were advised that she would have been failed in the third grade if she had not already been required to repeat the first grade. The student was administratively promoted from the sixth to the seventh grade after attending summer school. The student was passed from the second year of the seventh grade to the ninth grade only because the school system decided to calculate grades based upon five of the six grading periods (deleting grades which would have resulted in a failure of the Seventh Grade for the

second time) so as to not punish the student for her problems. There have been numerous disciplinary write-ups and actions, suspensions, and even expulsions exhibiting deterioration over the years. Subsequent to the request for Due Process Hearing in September of 1996, the parents unilaterally placed the student at Peninsula Village in December.

II. POSITION OF THE PARTIES

The position of the parents is that the school failed to identify the student as entitled to special education and, therefore, failed to provide special education and related services to which the student was entitled as early as the first grade. Counsel for the parents/student presented evidence divided into three time frames: Elementary School; Middle School; and, High School until the Due Process Hearing. Relief sought includes certification of eligibility for special education, payment for expenses associated with the unilateral placement of the student at Peninsula Village, residential placement for further education, and compensatory education.

The position of the school system, as reflected by counsel and the several witnesses who were employees of the school system, is that the unacceptable educational performance and the unacceptable disciplinary behaviors of the student were the results of wrong choices made by the student. The school employees testified that if the student had made good choices, she would have done well in school and had little or no behavior problems. The school system also points out that in November of 1995 and January of 1996 one

or both parents signed in agreement the Integrated Assessment Reports concluding the student did not meet criteria to receive special education services.

III. ISSUES

Issues for determination include the applicability of the statute of limitations to the parents' claims, the admissibility and weight of evidence offered post-hearing, the eligibility of the student for special education under the Individuals With Disabilities Education Act (IDEA), and, if eligible, whether the unilateral placement at Peninsula Village was appropriate.

IV. STATUTE OF LIMITATIONS

A motion in limine based upon a statute of limitations was considered and taken under advisement at the beginning of the hearing. Dates had been previously set for filing of any pre-trial motions and hearing, if necessary. No motions were filed and no hearing was held. However, upon consideration of the motion in limine, the Administrative Law Judge would agree that a three-year statute of limitations would be applicable in this case. The period begins at the time of knowledge of a claim and applies to reimbursement of educational expenses, and probably most other claims under IDEA. Janzen v. Knox County Board of Education, 790 F.2d 484 (6th Cir. 1986). However, the statute of limitations should not bar the presentation, or consideration, of evidence as to the course of education of a student relating back more than the three years. Application of the statute of limitations would not change the ruling in this case.

V. POST-HEARING EVIDENCE

Following the hearing, the school system moved to admit letters of findings by the Tennessee Department of Special Education upon completion of an investigation of a complaint which had been remanded to the Department of Education by the Office of Special Education Programs (OSEP). The issues addressed in that correspondence were whether there had been a failure to assess the student in all areas of suspected disability and/or a failure to insure that the parents were fully informed of procedural safeguards "due to the fact that one of 'the parents' was non-English speaking." In response, counsel for the parents objected and, alternatively, offered for consideration the "CORRECTIVE ACTION PLAN" signed by the Director of Schools resolving an Office of Civil Rights (OCR) investigation.

The Administrative Law Judge has reviewed these documents. Based upon the issues for decision in this Due Process Hearing, the evidence which was presented for consideration during the Hearing, the purpose of a Due Process Hearing, and the agreement of counsel that Section 504 issues were outside of, and not part of, this Due Process Hearing, it is concluded that the items offered as post-hearing evidence bear little or no weight upon the issues to be decided. The evidence presented during the Due Process Proceedings must be considered and become the basis of a decision made by the Administrative Law Judge. The conclusions reflected in evidence submitted post-hearing are not based upon all the information available to the Administrative Law Judge and it is not clear what

conclusions may have been drawn by those persons if they had the benefit of these materials. Rather than deny admission, the documents are admitted and made a part of the record for possible consideration during any further review of this matter.

VI. APPLICABLE LAW

The Individuals With Disabilities Education Act has the stated purpose "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs . . .." 20 U.S.C. §1400(c). Tennessee statutes relating to special education provide that the legislative intent is "to provide, and to require school districts to provide, as an integral part of free public education, special education services sufficient to meet the needs and maximize the capabilities of handicapped children." T.C.A. §49-10-101(a)(1).

IDEA defines "special education" as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability . . ." 20 U.S.C. §1401(16). The act also defines "related services" to include "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a

disability to benefit from special education . . .." 20 U.S.C. §1401(17).

Tennessee defines "special education services" as "classroom, home, hospital, institutional and administrative services needed to meet the needs of handicapped children; transportation of such handicapped children who are unable to use public transportation; corrective and supporting services including diagnostic and evaluation services, social services, physical and occupational therapy, job placement, orientation and mobility training, braillist, typists and readers for the blind, specified materials and equipment in other such services as approved by the division for the education of the handicapped and authorized by the State Board of Education; and other services that may be approved by the State Board of Education to assist handicapped children in taking advantage of or responding to educational programs and opportunities." T.C.A. §49-10-101().

Residential placement is contemplated if "necessary to provide special education and related services to a child with a disability . . ." 34 C.F.R. 300.302 See Babb v. Knox County School System, 965 F. 2d 104 (6th Cir. 1992); Clevenger v. Oak Ridge School Board, 744 F. 2d 514 (6th Cir. 1984); Brown v. Wilson County School Board, 747 F. Supp. 436, 16 EHLR 718 (M.D. Tenn. 1990), and cases discussed therein.

Behavioral problems can result in a handicapping condition requiring special education under the Act. See Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). In Honig, the

Court noted that the student was unable to control his impulsive, aggressive behavior and that his "very inability to conform his conduct to socially acceptable norms [rendered] him 'handicapped' within the meaning of the Act." Id. at 320, 108 S.Ct. at 602, 98 L.Ed.2d at 705. See 20 U.S.C. 1401(1), 34 C.F.R. 300.5(b)(8) (1987). See also Clevenger v. Oak Ridge School Bd., supra, at 516.

"Seriously emotionally disturbed" is defined as a condition exhibiting one or more of five characteristics over a long period of time and to a marked degree which adversely affects educational performance. Babb v. Knox County School System, 965 F. 2d 104 (6th Cir. 1992); 3 C.F.R. §300.5(b)(8). A factually similar case where a hearing officer found entitlement to special education under the certification of seriously emotionally disturbed is Hacienda La Punte Unified School District of L. A. v. Honig, 976 F.2d 487 (9th Cir. 1992).

Although states are not required to "maximize the potential of handicapped children", Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176, 189, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982), educational benefits provided by the State must be more than *de minimis* before it is "appropriate." Doe v. Board of Educ. of Tullahoma City Schools, 9 F.3d 455, 459 (6th Cir. 1993) cert. denied, 114 S.Ct. 2104 (1993).

VII. DISCUSSION

This student's grades were low in the first grade and the parent remembered that the teacher was concerned about lack of progress in reading. The student was required to repeat the first

grade. She successfully completed the first grade on her second attempt but experienced problems, including discipline and self-control and following directions. The student reportedly did well in the second grade and the success was attributed to the teacher. In the third grade, the student had many problems resulting from not paying attention in class, not completing work, and behavior. The student had been placed in a Title I reading program when in the first grade but it was discontinued in the third grade upon the belief that she was not completing her regular classroom assignments because of attending the Title I Class. The parents were advised that the student would have been required to repeat the third grade if she had not already repeated the first grade. The parents tried to work with the teacher to obtain a written list of assignments, but the teacher would not cooperate. The parents went to the principal and it helped. The student experienced similar problems in the fourth grade and the parents went to the principal to get assignments sent home. The student's problems centered around not paying attention in class and not completing assignments.

In the fifth grade, the school experience worsened, the student did not pay attention, did not complete assignments, and there was conflict between the student and teacher. The parents learned of the problems at a conference when they were presented with school papers which had not been sent home. The parents tried unsuccessfully to set up a written homework assignment sheet with the teacher. The parents spoke with the principal and subsequently

obtained written assignments. The father, a custodian with the school system, determined that the problems with the teacher had become so bad that he moved the student to the school where he worked. There he could more closely monitor the student and work with the teacher.

At least one parent had meetings with teachers and administrators while the child was in the sixth grade and doing poorly academically. The student attended summer school after the sixth grade and was administratively promoted to the seventh grade. During the seventh grade, behavioral problems increased and the student was expelled from regular school to attend an alternative school. Grades and behavior improved somewhat at the alternative school, a very structured environment. The parent testified that after the student returned to regular school from the alternative school, he requested testing be performed on his daughter only to later be advised that the school would not be able to test her that year. The student failed too many classes in the seventh grade to be promoted even upon attending summer school.

This student attended the seventh grade for the second time beginning in 1995. She was hospitalized on September 19, 1995 upon threatening suicide. A psychological evaluation was performed and a psychiatrist diagnosed major depression, attention deficit disorder, and oppositional defiant disorder.

After the student returned to school, there were disciplinary problems. An interim educational plan was developed, and an M-Team was conducted on November 8 at which time it was determined

that the student was not eligible for special education. The father explained that when he signed a document indicating agreement, he understood he was only agreeing that the M-Team decided she was not eligible for special education, not his personal belief. After the November M-Team, disciplinary problems escalated and he requested a meeting for further evaluation. At that meeting on January 23, 1996, it was determined that the student had been disciplined a number of times since the November determination of non-eligibility for special education. The school employees further disclosed they had been treating this student differently than other students in that they had not disciplined her for some conduct and had not expelled her, or recommended her for expulsion, as they would have other students had they engaged in the same behaviors. The father had requested the student be placed in alternative school to complete the remainder of the year because of it being a highly structured educational setting. The person responsible for her discipline at school, an Assistant Principal, apparently in agreement with the father, noted she would do better academically in alternative school because of its highly structured nature, and had inquired of school administration of the possibility of such placement. School policy was that a student could not be remain in the alternative school setting and, therefore, alternative school was not an option.

At the time of the January meeting, the school had recommended expulsion and a hearing for determination of expulsion was set before the School Board. School personnel agreed that they would

conduct a behavioral component review prior to the hearing on the school's recommendation for expulsion but suggested that there was not much chance for a determination of eligibility under IDEA because of passing grades and passing TCAP scores.

School personnel were to obtain additional records, do additional testing, obtain observations and history from family and teachers, and make a determination. The school was provided releases to secure more recent information and complete records from several sources. At that point, the school knew the student was receiving services from a community mental health facility and, in addition, a psychiatrist was providing periodic counseling and various medications to treat depression and other conditions.

The tape of the January 23, 1996 meeting strongly suggests that the school system had no inclination to change the decision made in November. School personnel on several occasions said that they were "confused" because of the parents' request, not understanding what the parents wanted or expected from the school and the meeting, and because the diagnosis they had from the psychiatrist did not list depression. The father made it clear that what he wanted was for his student to be able to remain in school and successfully complete her educational program.

On January 30, the M-Team again determined that the student was not eligible for special education and the father testified that his signature, as on the November, 1995 document, again

indicating his agreement that the M-Team decided this student was not eligible for special education, not his personal opinion.[1]

In the second year of the seventh grade, she was graded only on five of the six week periods so that she could be promoted. The student had failures in the other six week period which would have resulted in failing the grade, but the school did not want to punish her for her problems and was trying to help her out by passing her. A teacher, during the second seventh grade, had written on a progress report to Guidance that if the student was corrected, she became "very upset" and "very hostile" based upon an incident when the student became "very angry" and for what reason the teacher could not remember. The teacher's testimony was that "she was getting very upset at the time and that stood out in my mind". [2] A meeting was conducted in June with the school system psychologist and at least one other administrator who

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[1]The school psychologist testified that she would typically explain to a parent that their signature and check mark would indicate whether they agree or disagree that their child met criteria for special education and whether the child's needs could be met in a regular program with or without intervention. She may have told the parents that they were not part of the assessment process in and of itself but did not believe she had ever told a parent when they signed indicating agreement that they were not agreeing. The November, 1995 Integrated Assessment Report has both parents signature and the January 30, 1996 report has the father's signature.

[2]With regard to behaviors at home, the parent testified that this child was more aggressive than her older or younger sisters who did well in school, plus more of a discipline problem, and had bursts of anger which he identified as temper fits. The disciplinary problem at home escalated over the years.

recommended the student be promoted from the seventh to the ninth grade which would be grade appropriate. The parent agreed.

In June of 1996, the student took an overdose of medication which necessitated a call to health care providers but she was not hospitalized. A second opinion psychiatric evaluation performed on June 24, 1996, noted that the emotional difficulties of the student were both behavioral and academically related. A portion of the evaluation and report is as follows:

> ASSESSMENT/RECOMMENDATIONS:
>
> This girl presents with ego fragility and emotional instability. Her ability to function in age-appropriate academic and social setting is impaired. Her depression is evidenced by affective blunting, low motivation, and mood instability. The discrepancy between subjective intelligence and academic performance suggests learning disabilities, as well as are a result of serious emotional disturbance.

The recommendations included medication and a small class setting employing behavior modification techniques in addition to school counseling. In July of 1996, there was a second hospitalization.

Prior to the beginning of the ninth grade, a parent met with the principal of the High School to share information regarding the student. There was a second meeting on September 3rd with the school psychologist that had been involved in the previous M-Teams, the school psychologist for the high school, and other school administrators and teachers. The parent testified that he provided Dr. Pritchett's report and allowed review of an unsigned

copy of the report of Dr. Mikicki.[3] He recalls no discussion regarding special education. There was a subsequent meeting with a vice-principal on September 13th to discuss the behavior problems and multiple write-ups for the student. The father testified that the vice-principal agreed with his opinion that the student qualified as SED. On the afternoon of that meeting, September 13th, the father filed for a Due Process Hearing.

There were numerous disciplinary problems with the student during the ninth grade and she passed no courses for the first six week grading period. At the recommendation of her psychologist, the student was on a homebound program for approximately two months until in December 1996, she was taken to the hospital after an attempted drug overdose. She was then placed in a residential treatment program upon recommendation of the psychologist because she had not been responding to out-patient therapy and was having continued problems.

There is no question but that the academic performance and behavior of the student at school was unacceptable. Deterioration is apparent from this record. The school's position was that this was the result of the student's bad choices and parental permissiveness. However, medical and psychological providers were

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[3]Dr. Pritchett's report is the second opinion psychiatric evaluation with a June 24, 1996 date quoted from on page 13 of this decision.

Dr. Mikicki's report is a discharge summary from the hospital admission July 20-26, 1996 and stating, in part, the doctor's opinion that this student needed assistance with her behavior at school and at home and that she met the criteria for being seriously emotionally disturbed.

of the opinion that it resulted from one or more conditions which should have entitled the student to special educational services. A summary of portions of the relevant testimony illustrates the contrast in opinions.

The school's position and the procedures resulting in denial of eligibility for special education services for this student were described by the school psychologist. The student had first come to her attention some time after the hospitalization in September of 1995 when it was reported that the student had a suspected disability.

An M-Team in November of 1995, reviewed the behavioral file with disciplinary reports, progress reports, observations from teachers, and test results. The observations and teacher reports indicated the student did not turn in homework regularly, had low test scores, kept her head down a lot, was inattentive, very upset and hostile, talked aloud to herself a lot and that it is was best to leave her alone. The reports reflected an impact on the student's learning "to some degree." Although it was recognized that the student had an impairment/disability, did not participate in class, did not turn in homework regularly, was inconsistent in passing tests, responded to authority in a non-compliant manner, and was easily distracted, moody, and oppositional, certification of eligibility for special education was denied upon the educators' conclusion that behavior could be dealt with and upon reports the student had scored in an average range on standardized tests.

The first page of a second evaluation report dated January 24, 1996, and which should have been considered by the January 30, 1996 M-Team, states the student "had been admitted to the Psychiatric Unit of Memorial Hospital for oppositional depressive symptomologies at home and school and that [the student] had also allegedly made a suicide threat." At some point in time, the psychologist revised the information on the front page and replaced the above with a statement that "admitted to the Psychiatric Unit of Memorial Hospital for oppositional and unruly behavior. Past history includes a suicide attempt and arrest for shop-lifting a little over a year ago." The psychologist agreed that the revised version left out the statement about depressive symptomologies at home and school. The psychologist agreed that depressive symptomologies were something that "would certainly develop into SED". Both front pages were admitted as Exhibits.

The January, 1996 re-evaluation report was written, and the M-Team was held on January 30, 1996, without benefit of records from Dr. Holland and counselor Ellen Graham, which were received by the school psychologist, or were stamped received in her office, later in the afternoon on January 30, 1996. These were some of the records for which releases were obtained after their importance was discussed at the January 23rd meeting.

A Behavioral Assessment Test (BASC), considered in the report and at the January 30th M-Team meeting, reflected two teachers endorsing "at-risk behavior", the parent endorsing "clinical levels

of behavior", and one teacher and the student endorsing "no significant levels of maladaptive behavior."

The decisions of the M-Team were greatly influenced by the opinions and conclusions of the school psychologist reflected in the Integrated Assessment Reports. The psychologist appeared to have based her conclusions very heavily upon an interview with the student during which the student said she did feel depressed at times but it did not interfere with her social activities and that "she had many, many friends." The student had also said that she did not like school except as an opportunity to be with peers and that she had a lot of conflict at home. The school psychologist did not discover signs of depression during an interview and evaluation but it could have been because of a therapeutic level of medication being used to treat the student's depression at the time. The statements by the student, accredited by the school psychologist, that "she had several hundred friends, participated in many outside activities like dating, and did fine at home" were not true.

The re-evaluation dated January 24, 1996 and considered at the M-Team January 30, 1996 had no information about the student's "major depression" which had been diagnosed September 23, 1995. The M-Team minutes of January 30, 1996 states that no doctor had reported the student being depressed. However, this statement was erroneous, major depression had been diagnosed by a doctor and those records were apparently received by the school system on the

day of the M-Team meeting, January 30, 1996, after the meeting concluded.

Ellen Graham, a licensed psychological examiner with previous educational diagnostic experience, testified by deposition and explained that she had been treating or counseling with the student since May of 1995. She had written a letter to the school system psychologist dated January 30, 1996 expressing her opinion that the student would be eligible for special consideration under Section 504 and IDEA because of attention deficit disorder and being seriously emotionally disturbed. The January 30, 1996 letter to the school psychologist, beginning with "per our telephone conversation" provided, in part, as follows:

> It is my understanding that the student is currently facing possible expulsion for an accumulation of excessive disciplinary points. I encourage an M-Team to consider each behavioral offense to determine those which are related to her diagnoses of dysthemia and attention deficit hyperactivity disorder. Additionally, I believe that it is important to determine if the student has been appropriately placed at the time of the behavioral infractions. Due to symptoms of dysthemia and ADHD, I recommend placement in a small structured class, which would allow for modification of assignments and allow the student to address negative cognitions, which lead to disruptive behaviors within the school setting.

Another letter to the school psychologist, dated March 13, 1996, again stating that the student meets criterion to receive services under Section 504 and IDEA, includes recommendations for additional assessments to determine if there is a learning disability and also recommends reconsideration of the diagnostic

criterion for serious emotionally disturbed. This second letter also provides, in part, as follows:

> I recommend placement in a small structured class or program designed to address both academic and emotional needs, including placement in a private therapeutic educational setting, if deemed necessary by the school support team. In such a placement, the student would both receive appropriate educational structure, as well as being in a setting which would address her behavioral and emotional needs.

This three page document is signed by Ms. Graham and a Ph.D. clinical psychologist at the Community Mental Health Care with the additional statement and signature by Dr. Holland, psychiatrist, indicating he had reviewed and agreed with the information and recommendations in the letter.

Testimony of Jerry Michael Holland, M.D., certified by the American Board of Psychiatry and Neurology, was presented by deposition. Dr. Holland began treating the student after she was psychiatrically admitted September 19, 1995 and he assumed her care during that hospitalization. When he discharged her on September 23, 1995, the diagnoses were major depression, attention deficit disorder, and oppositional defiant disorder. The student was readmitted to the hospital in the summer of 1996 and again in December of 1996. During the December, 1996 hospitalization, it was then determined that a residential level treatment was the only treatment likely to prove as an adequate intervention. The student was placed at Peninsula Village on or about December 26, 1996.

Dr. Holland discussed the symptoms and treatments of various disorders the student had been diagnosed with, including bipolar

mood disorder, oppositional defiant disorder, and attention deficit hyperactive disorder. The doctor had reviewed various materials, including comments on the first grade report card of this student, and noted that those comments and the behaviors of the student could have been reflective of the disorders he had identified. However, the doctor noted that some difficulties might not be the result of a clinical condition and that it may have been very difficult to have made a diagnosis at the time. The doctor further stated that there was never any doubt that the student had a diagnosis for several, or at least more than one, conditions to account for some behavioral disturbances. The doctor did note that these conditions could affect the ability of an individual to control their behavior and, left untreated, could result in a cumulative loss of education.

The testimony of the clinical director of Peninsula Village, a licensed clinical psychologist, was also presented by deposition. He explained that Peninsula is a long-term residential program generally prescribed for severely disturbed adolescents who have received previous treatment but have not been able to benefit from it or have not received enough benefit from the previous treatment and are referred to the residential treatment program for more intensive, reconstructive work.

The program has an important educational component because most of their patients have "massive educational deficits' which they address with a process of prescriptive education including an individual education plan. The campus has its own state accredited

school which allows transfer of course work to a patient's home school and, also, many students receive their diploma and graduate from the residential school.

The major diagnosis for the student following placement at Peninsula was bipolar disorder NOS, which meant an atypical manic-depressive picture. He explained that when the diagnosis was that the student "suffers a bipolar picture, we mean that she suffers periods of depression, alternating with periods of excessive anger that sweeps over her and such that she can scarcely contain it." Even when she was not experiencing those episodes, her condition caused distortion of her experience with people.

Achievement testing performed on the student following her admission to the residential facility in December of 1996 disclosed that her scores were grossly deficient in a number of areas and were surprising in someone of average intelligence of the student's age. This student's reading vocabulary was in the 10th percentile, spelling capacities in the 15th percentile, language expression in the 12th percentile, math computation in the 13th percentile, and the total reading score in the 13th percentile. With an average intelligence IQ of 95, these scores suggest a student who has not derived much benefit, or nearly as much benefit as would be expected, from schooling. An achievement test performed earlier by psychologists and relating to a hospital admission had roughly equivalent scores although some were higher and some were lower.[4]

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[4]That psychological evaluation was dated September 20, 1995 and was considered at the first M-Team.

The educational program at the residential facility included a "behavior skills, social skills" component because it was very difficult to educate a student with the behavior of this student. The more disturbed a student is in the classroom setting, the less the student is able to learn.

With regard to the educational certification criteria for SED, Dr. Sherwood would find she qualified with an inability to build or maintain satisfactory interpersonal relationships with peers, teachers, and other significant persons, that she exhibited inappropriate types of behavior or feelings under normal circumstances, and that she had a general pervasive of unhappiness or depression.

The typical pattern for an adolescent diagnosed with atypical bipolar disorder would have been for the child to be ADHD and move into the atypical bipolar disorder and it was suspected to be the course of events in this case.

It is acknowledged that special education eligibility is an educational determination. The non-school employees were for the most part clinicians, not educators, although at least two had relevant experience in the educational setting. More than one non-school system professional had recommended further testing to determine if the student had a learning disability. Although the student had scored in the average range on some standardized tests, the student was deficient in more than one educational area. The student had been suspended, expelled, and disciplined numerous times over her years in this system. Academic performance and

behavior deteriorated to the point where she could no longer continue living at home and attending regular school.

Determining the cause is easier at this point than before because of the historical information from the school system and parents and the information from the psychological and medical providers outside the school system. Weighing the evidence to determine if the cause was as suggested by the school system or some diagnosed or undiagnosed emotional/ psychological condition and/or learning disability entitling the child to special education leads to a conclusion in favor of the student. The weight of evidence clearly establishes to the satisfaction of the Administrative Law Judge that the school system was mistaken in not identifying this student as eligible for special education and related services under IDEA.[5]

Under the present system, it is hoped that a student such as this would be referred to an S-Team and efforts made to provide educational assistance at the first grade level. However, there was no diagnosis until 1995 and, based upon this record and for purposes of this Due Process Hearing, a decision cannot be made that the school system improperly failed to identify and certify this child as eligible for special education in Elementary and early Middle School grades.

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[5]It is acknowledged that this decision is made in hindsight and that not all information was known to the school system. However, the school system does have responsibility for identifying and providing services to eligible students.

IV.

FINDINGS AND CONCLUSIONS

1. The student should have been certified eligible for special education at least as seriously emotionally disturbed based upon information in existence and which should have been considered by the school at least in January of 1996. The information presented at the Due Process Hearing would result in certification as eligible only under seriously emotionally disturbed.

2. The weight of evidence clearly establishes, to the satisfaction of the Administrative Law Judge, that the school system was mistaken in not identifying this student as eligible for special education and related services under IDEA.

3. This student was not making reasonable progress and her needs could not be accommodated within regular education at least due in part to emotional behavior.

4. To determine if the parents are entitled to reimbursement for expenses related to the placement of the student at Peninsula, it must be determined that the education/services provided by the school system violated IDEA and the placement at Peninsula was appropriate. See Florence County School District Four v. Carter, 510 U.S. 7, 126 L.Ed.2d 284, 114 S.Ct. 361 (1993); Burlington School Comm. v. Massachusetts Department of Education, 471 U.S. 359, 85 L.Ed.2d 385, 105 S.Ct. 1996 (1985).

5. The educational needs of this student would not have been met without placement at Peninsula. Placement at Peninsula Village was appropriate for this student. The parents are entitled to

reimbursement for expenses associated with the unilateral placement of the student at Peninsula.

6. The school failed to identify and certify the student as eligible for special education under IDEA, ascertain the student's educational needs, and respond to deficiencies at least for one school year -- from January of 1996 through December of 1996 -- and, therefore, the student is entitled to one year of compensatory education. See M.C. v. Central Region School District, 81 F.3d 389 (3rd Cir. 1996).

IT IS, HEREBY, ORDERED as follows:

1. This student shall be certified as eligible for special education and related services under IDEA as seriously emotionally disturbed.

2. The residential placement at Peninsula Village beginning in December of 1996 was necessary and appropriate to provide a meaningful educational opportunity for this student.

3. The school system shall reimburse the parents for expenses they have incurred for the placement at Peninsula Village.

4. An M-Team shall be convened to determine the continuing appropriateness of the placement at Peninsula Village with the understanding that premature termination of the program could erase the benefit to date.

5. The student is granted one year of compensatory education, if necessary.

Entered this 28 day of August, 1997.

JACK E. SEAMAN, ADMINISTRATIVE
LAW JUDGE
611 Commerce St., Ste. 2704
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Prof. Resp. #4058

NOTICE

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order in non-reimbursement cases or three (3) years in cases involving education costs and expenses. In appropriate cases, the reviewing Court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of section 49-10-601 of the Tennessee Code Annotated.

Within sixty (60) days from the date of this order (or thirty [30] days if the Board of Education chooses not to appeal), the local education agency shall render in writing to the District Team Leader and the Office of Compliance, Division of Special Education, a statement of compliance with the provision of this order.

CERTIFICATE OF SERVICE

I hereby certify that a true and copy of the foregoing document has been sent by facsimile transmission to Justin S. Gilbert, Esquire, at (901) 424-0562 and to John Kitch at 385-9123 and mailed, postage prepaid, to Justin S. Gilbert, Esquire, Elks Building, 110 East Baltimore, P. O. Box 2004, Jackson, Tennessee 38302-2004 and to John Kitch, Esquire, Suite 305, 2300 Hillsboro Pike, Nashville, TN 37212, this 28 day of August, 1997.

JACK E. SEAMAN

cc: Steve Raney, Esq.